

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAMELA LYNNE HART,

Defendant-Appellant.

UNPUBLISHED

October 7, 2010

No. 291570

Otsego Circuit Court

LC No. 08-003936-FH

Before: GLEICHER, P.J., and ZAHRA and K.F. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle while intoxicated, third offense, MCL 257.625(1) and (9)(c). The trial court sentenced defendant to 24 months' probation, with service of the first 148 days in jail. Defendant appeals as of right. We affirm, and decide this case without oral argument in conformity with MCR 7.214.

Another motorist observed defendant driving erratically on June 6, 2008. The other driver, who defendant nearly struck with her car, notified the police and followed defendant to her home. The driver approached defendant to ascertain her condition after she parked in her driveway, and the driver noticed that defendant appeared intoxicated and spoke in a slurred fashion. An officer who arrived on the scene within about 30 minutes similarly recounted that she heard defendant slurring her speech and smelled "a strong odor of alcohol" emanating from defendant. The officer arrested defendant when she failed a series of field sobriety tests and refused to consent to a preliminary breath alcohol test. The police later obtained a blood sample from defendant, an hour and fifteen minutes after her arrest, the subsequent testing of which revealed that defendant had a blood alcohol content (BAC) of "0.27 grams [of] alcohol per 100 milliliters of blood." The police found a case of beer and five empty beer cans inside defendant's car.

Defendant challenges on appeal only the effectiveness of her trial counsel. Defendant maintains that her counsel inexcusably neglected to produce an expert witness that the trial court had already approved, because the expert would have offered testimony detailing how gastric

bypass surgery impacts the body's absorption and elimination of alcohol.¹ Whether a defendant has received effective assistance from her counsel comprises a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review for clear error a trial court's findings of fact, if any, while we consider de novo questions of constitutional law. *Id.* Here, defendant "failed to move for a new trial or an evidentiary hearing with regard to" her ineffective assistance claims," and we thus limit our review to mistakes apparent on the existing record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).²

"[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 777 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id.* at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689. A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009) (internal quotation omitted).

Defendant insists that the expert would have testified that persons who have undergone gastric bypass surgery and consume alcohol have a higher BAC, reach the higher BAC sooner, and see it decrease more slowly than the average nonbypass individual. According to defendant,

¹ With respect to the effect of alcohol on defendant, the parties agreed to read the following stipulation to the jury:

[D]efendant has undergone a procedure referred to as gastric bypass surgery. Recent scientific studies indicate that patients who have undergone gastric bypass surgery and consume alcohol have their blood alcohol content raise [sic] faster than those who have not had the surgery. Additionally, studies indicate that these patients feel a more immediate response to alcohol. Studies have found this to be especially true in women. Studies also indicate that after approximately 30 minutes, the patient's blood alcohol content is approximately equivalent to someone who has not undergone gastric bypass surgery.

² In October 2009, this Court denied a defense motion to remand. *People v Hart*, unpublished order of the Court of Appeals, entered October 15, 2009 (Docket No. 291570).

the expert's testimony would have given the jury scientific proof that her theory at trial, that she had not consumed any alcohol until after she arrived home around 11:30 a.m. on June 6, 2008, was persuasive. However, defendant has not supplied any specific substantiation from a particular gastroenterologist, toxicologist, or other expert tending to support her assertions. *People v Hoag*, 460 Mich 1, 8; 594 NW2d 57 (1999) (rejecting ineffective assistance of counsel contentions for which the defendant failed to satisfy his burden to "establish the evidentiary support which excludes hypotheses consistent with the view that his trial lawyer represented him adequately") (internal quotation omitted); see also *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003) (observing that the "defendant necessarily bears the burden of establishing the factual predicate for [a] claim" of ineffective assistance) (internal quotation omitted).

Furthermore, our review of the record belies defendant's implicit complaint that, for no reason, her trial counsel simply opted against producing an expert witness. Discussion at a second January 2009 motion hearing addressing the defense request for the appointment of an expert reflects that an expert previously authorized by the trial court had declined to testify if he did not receive \$700 in additional preparation fees, defense counsel averred that the defense did not have access to the \$700 requested by the expert, and the trial court expressed reluctance about approving the additional expenditure. Defense counsel and the prosecutor ultimately agreed that they would introduce at trial some alcohol ingestion information from recent studies and news articles regarding gastric bypass patients, in lieu of calling a defense expert. We note that defendant has not offered on appeal any manner of proof that the originally identified expert witness would have testified absent the additional retention fees.

The stipulation by defense counsel concerning the effect of alcohol on female gastric bypass patients covers the majority of the propositions contained in the scientific studies referenced by defendant. But we recognize that the stipulation describing the effects of alcohol ingestion on gastric bypass patients does not highlight the notion reflected in multiple studies that a female gastric bypass patient's consumption of a particular amount of alcohol might lead to a measurably higher BAC than the same quantity of alcohol would give rise to in a nonbypass patient. Even were we to presume that defense counsel engaged in objectively unreasonable conduct when he crafted the stipulation instead of presenting an expert witness, who would have explained the scientific data more fully, we find no reasonable likelihood that the presentation of an expert would have altered the outcome of defendant's trial.

The articles and scientific evidence defendant attached to her brief on appeal support that a female gastric bypass patient who consumes a quantity of alcohol will reach her peak BAC level within approximately 10 minutes, much sooner than a nonbypass person who consumes the same quantity of alcohol; that the female bypass patient will reach a higher BAC level than the nonbypass individual; and that the bypass patient will eliminate the alcohol consumed at a similar, but slightly reduced rate than the nonbypass person. Given the undisputed evidence that defendant's blood draw took place 75 minutes after her arrest and most recent possible alcohol consumption, she undeniably had a significantly more elevated BAC 75 minutes earlier, rendering unlikely her account that she drank merely five beers after arriving home. We conclude that defense counsel's alleged neglect to present an expert or otherwise emphasize that gastric bypass patients reach higher BAC levels did not create a reasonable probability that the result of defendant's trial might have differed, in light of the 75-minute duration between defendant's arrest and the BAC blood draw and defendant's high BAC level of 0.27. Stated

differently, any objectively unreasonable failure by defense counsel did not deprive defendant of a substantial trial defense.³ *People v Dixon*, 263 Mich App 393, 398 (lead opinion by Cooper, J.), 400 (Bandstra, J., concurring); 688 NW2d 308 (2004).

Moreover, irrespective of the precise level of defendant's BAC, the motorist who had a close encounter with defendant's car shortly before noon on June 6, 2008 testified that she drove very erratically, and that her driving prompted him to follow defendant home. The motorist further testified that he approached defendant to ascertain her condition, and when defendant got out of her car the motorist characterized her as "really intoxicated or on something. . . . She was having a hard time just talking, . . . moving around, everything. . . . She looked wasted. . . . you know, not in full control of your body." The motorist continued, "She looked like she was so drunk that she just couldn't walk. She couldn't do anything. She looked like she was passing out in her car." The observations of the first officer to arrive approximately a half-hour later comported with the motorist's description of defendant. Defendant insisted at trial that her erratic driving occurred because a wasp had flown up her dress, and that she also "was watching out for potholes" and other construction-related road irregularities. In convicting defendant, the jury apparently discredited her protestation that she had not driven under the influence of alcohol and her explanations for her erratic driving. This Court generally may not revisit the jury's credibility determinations, and we detect no basis for disturbing the verdict, especially in light of the properly admitted evidence of defendant's guilt, including the motorist's testimony, the first

³ To the extent that defendant disputes the effectiveness of her trial counsel with respect to his cross-examination of the prosecutor's forensic toxicologist, our review of the record confirms that defense counsel had familiarity with the relevant scientific discoveries and information relating to alcohol consumption by female gastric bypass patients. Regarding defendant's complaints that counsel should have "impeach[ed] the State's toxicologist when he claimed that only one study existed," or "could have questioned the validity of the blood sample," "could have asked whether alcohol was used to sanitize . . . Defendant[s] . . . skin before the insertion of the needle," "could have asked if medications existed that may change the results of the blood test," and "could have asked about the typical behavior of an individual with a blood alcohol level of .20" and .30, we observe that the prosecutor already had asked about the integrity of the blood sample. The remaining imagined inquiries that defense counsel could have posed fall squarely within the scope of counsel's strategic decisions. *People v Rockett*, 237 Mich App 74, 76; 601 NW2d 887 (1999) ("Decisions regarding . . . whether to call or question witnesses are presumed to be matters of trial strategy," and this Court "will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight."). Moreover, defendant has not persuaded us that defense counsel's neglect to ask any of the imagined questions deprived her of a substantial defense, or otherwise gave rise to a reasonable probability of a different trial outcome. *Dixon*, 263 Mich App at 398; *Rockett*, 237 Mich App at 76-77. Lastly, contrary to defendant's contention, the prosecutor's toxicology expert was never qualified as "an expert on gastric bypass surgery," and defense counsel competently tested the toxicologist's opinions in light of the recent scientific discoveries regarding female gastric bypass patient alcohol consumption.

trooper's observations of defendant and the five empty beer cans in her car, and defendant's BAC results well in excess of the legal limit 75 minutes after her arrest. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly